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No. 82-49

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERATED DEPARTMENT STORES, INC.
d/b/a I. MAGNIN,

Petitioner,

vs.

PHILIP D. CANCELLIER, JOHN W. COSTELLO and ZELMA SMITH RITTER,

Respondents.

Reply Brief of Petitioner

ROBERT S. DAGGETT
Spear Street Tower
One Market Plaza
San Francisco, CA 94105
Telephone (415) 442-0900
Attorney for Petitioner

Of Counsel:
DONALD D. CONNORS, JR.
JAMES H. QUIRK
CECILY A. WATERMAN
REBECCA D. STRAUSE
BROBECK, PHLEGER & HARRISON

August 18, 1982

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Respondents' Brief in Opposition[1] itself argues convincingly for the writ. In this short Reply, we explain why.

RESPONDENTS' MAIN CONTENTION IS AN ARGUMENT FOR CERTIORARI IN THIS CASE

Arraying at the outset (Br. Opp. 3-7) counsel's conception of the strongest evidence plaintiffs marshaled for the jury —and leaving unmentioned the array of conflicting evidence Magnin marshaled in support of its own case—respondent say that the harmless error holding of the Court of Appeals is one *"well within the realm of authority normally committed to the circuit court level"* because plaintiffs presented to the jury "extraordinary evidence of direct discrimination" (Br. Opp. 12). The further statement that (Br. Opp. 7-8) "Federated's position before this Court that evidence was 'sharply disputed' " is irrelevant because *"one assumes [such] will be true of any case that proceeds to trial,"* illustrates the threat to jury trials of age discrimination cases posed by the harmless error decision of the Ninth Circuit in this case. If counsel, understandably impelled by advocates' motives, so easily embrace appellate fact finding on liability as a substitute for the decision of a correctly

1. Brief in Opposition to Petition for Certiorari of Philip D. Cancellier et al., plaintiffs below, cited here as "Br. Opp. ___." Magnin's petition for certiorari is cited "Pet. ___."

We certify, pursuant to Rules 21.1(b) and 28.1, that the caption of the case in this Court contains the names of all parties, that petitioner Federated Department Stores, Inc., has one subsidiary within the meaning of Rule 28.1, *viz.*, The Children's Place, Inc., a Delaware corporation, and that petitioner has no parent or other subsidiaries or affiliates.

Italics in matter quoted here has been supplied.

instructed jury, other counsel in jury age discrimination cases can be expected to do so, and the published opinion of the Court of Appeals will lend credence to it.

Respondents compound misconception with the assertion (Br. Opp. 11) that there is no need for the Court to take a hand in trial of future cases because "the Ninth Circuit has already accomplished that end" by prescribing in Note 2 of its opinion an appropriate jury instruction on ADEA liability. Had the Court of Appeals corrected the error it found in this case by reversing the judgment, respondents would be right. But when the court coupled its emphatic identification of substantive error at trial with even more emphatic directions against repetition, and then dismissed the error as *harmless in this case* because the Judges of the court below weighed conflicting evidence and found it heavily in plaintiffs' favor, the Court of Appeals declared a new and dangerous doctrine of harmless error for jury age cases which should be set right by this Court. We stress here, as we did in our petition for rehearing below (Pet., App. C), that the issue of the harmless or prejudicial character of the error adjudicated by the Court of Appeals was never briefed or argued anywhere in the litigation before the Ninth Circuit opinion was handed down. Both sides assumed that the error for which we contended, and which the Court of Appeals found emphatically to exist, would be prejudicial because the error went directly to the vitals of petitioner's substantive ADEA liability to respondents.

RESPONDENTS' CASES ON HARMLESS ERROR DO NOT SUSTAIN THE PROPOSITION FOR WHICH RESPONDENTS URGE THEM

McCandless v. United States, 298 U.S. 342 (1936), *Kotteakos v. United States*, 328 U.S. 750 (1946), and *Fillipon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919), long ago settled that substantive error in civil cases is *presumed prejudicial*

and requires reversal unless it *affirmatively* appears from the whole record that it was not prejudicial, i.e., harmless.[2] The Court of Appeals acknowledged that the error of the District Court in instructing the jury on liability in this case was substantive in its opinion on denial of rehearing (Pet., App. B) by amendment of the original opinion (App. A) to cite for the first time the decisions of the Court and the holding just summarized.[3]

The petition identifies (pp. 17-19) five categories of cases decided by the circuits in which error is held harmless.[4] To support their contention that the appellate finding of liability fact by the Court of Appeals here was "well within the realm of authority normally committed to the circuit court level" and made unremarkable by the disputed state of the trial record because conflicting evidence is commonplace in "any case that proceeds to trial" (Br. Opp. 12, 8), the brief in opposition cites but five cases. *Lynch v. The Travelers*

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2. The requirement for an "affirmative" showing of record to counter the presumption of prejudice was placed in italics by the Court in *McCandless*, 298 U.S. at 348.

3. We set out an illustration of the clashing evidence in conflict sent to the jury in this case, *infra*, p. 6.

4. A further category includes the cases where the complaining party waived the error. Waiver can be viewed either as converting what would otherwise be prejudicial error into harmless error or obliterating the error together for purposes of appellate review.

Understandably, respondents attempt to torture the statement of the Court of Appeals in this case that the instruction given on ADEA liability "was fashioned" from one submitted by Magnin into the hint of an illusion that petitioner should not complain because "Federated's action introduced the erroneous instruction into the record" (Br. Opp. 17). The fact is, as respondents implicitly concede, that both Magnin *and plaintiffs* proposed liability instructions which the trial judge rejected, and it is further conceded fact that Magnin's complaint that the instructions as a *whole* "completely failed to give any guidance" to the jury on liability was explicity and emphatically upheld in those words by the *Ninth Circuit itself* (App. A, p. A-4). Respondents' modest and not unexpected effort to transmute the facts into something more or different is not persuasive.

Indemnity Company, 452 F.2d 1065 (8th Cir. 1972); *Pherson v. Goodyear Tire & Rubber Co.*, 590 F.2d 756 (9th Cir. 1978); *Dairyland Insurance Co. v. Makover*, 654 F.2d 1120 (5th Cir. 1981); *Vanskike v. ACF Industries*, 665 F.2d 188 (8th Cir. 1981); and *Kend v. Chroma-Glo, Inc.*, 478 F.2d 198 (8th Cir. 1978). The inaptness of this thimbleful of authority to support respondents' sweeping, novel claim, and the ease with which the decisions are placed in traditional categories of minor, *procedural* harmless error, *is a further illustration of the threat to error-free trial of future age jury cases as a result of the interpretation which will surely be placed on the Ninth Circuit opinion in this case.* Here the trouble for cases still untried is not, as respondents say, to be found in the ADEA liability instruction now prescribed in Note 2 of the Ninth Circuit opinion *but in the larger and more potentially devastating risk that a new doctrine of harmless error unknown to other civil litigation has been declared for age and other employment discrimination cases in celebrated litigation by the published opinion of an experienced and respected tribunal.*

Lynch v. The Travelers Indemnity Company, supra, (Br. Opp. 14), holds that a jury instruction on the cause standard in an action to recover for windstorm damage as an insured loss was not an erroneous statement of governing state law, did not affect any substantial rights of the parties, and was at most a "very small" departure from preferred language. *Pherson v. Goodyear Tire & Rubber Co., supra* (Br. Opp. 15), holds that the instructions complained of by appellant did not misplace burden of proof when read in the light of other instructions. *Dairyland Insurance Co. v. Makover, supra* (Br. Opp. 15), decides only that the instructions taken as a whole stated "the substance of the law correctly." *Vanskike v. ACF Industries, supra* (Br. Opp. 14), affirmed a judgment against appellant's complaint about an instruc-

tion held argumentative but "not substantively incorrect." Finally, *Kend v. Chroma-Glo Inc., supra* (Br. Opp. 14), holds only that the instruction complained of correctly stated one of two approaches to an agency issue under state law in a diversity case.

The emphatic yet careful Ninth Circuit decision in this case makes plain beyond fair argument that the vice in the liability instruction given by the District Court was substantive, and substantive enough to upset judgments in future cases with reversal if the error is repeated. Such a situation is poles apart from the departures from procedural nicety and exact preferred language disclosed in but three of the five appellate decisions respondents' skilled counsel were able to find to support their "overwhelming evidence" claim. This reinforces three submissions: (1) the Ninth Circuit in this case substituted an appellate finding of fact on liability for a decision on conflicting evidence the jury in this case was denied a chance to make by the instructions the trial judge gave; (2) there is no law anywhere in the United States, *except in this case,* which permits this to be done; and (3) the appearance in this landmark age discrimination case of an alien, novel new doctrine of harmless error bodes trouble for the future akin to that seen in the early years of Title VII unless this Court is moved decisively to confirm that age discrimination cases remain in the mainstream of federal civil litigation.

We turn to a brief illustration of the conflicting nature of the evidence on which the Ninth Circuit made the ultimate liability finding.

ILLUSTRATIVE CONFLICTS IN THE EVIDENCE

As we have seen, respondents' statement of the case (Br. Opp. 3-7) arrays at the outset counsels' summary of plaintiffs' strongest evidence plucked here and there from a trial

record of more than 4,000 transcript pages. To emphasize in concrete terms what counsel acknowledge—and then wave aside as the stuff of the usual case which reaches trial on the merits—we set out below in the left column some of plaintiffs' summary examples from the record and in the right column the countervailing, conflicting evidence offered by Magnin. Through by no means comprehensive, this material illustrates the clashing lines of evidence between which the jury in this case was required to choose in arriving at a verdict under a liability instruction which, in the words of the Court of Appeals, "completely failed to give [the jury] any guidance as to the meaning" of governing federal law (Pet., App. A, p. A-4).

Plaintiffs' Evidence	Magnin's Evidence
1969 study (Pl.Ex. 46) referred to San Francisco salespeople as "terribly old."	The reference to old salespeople was to employees past mandatory retirement age when the memorandum was written and referred to replacement, not termination, of employees (Steiner, R.Tr. 2411-12).
1970-75 report stated that employee, age 59, "has, of course, reached her potential."	The document (Pl.Ex. 1) came to the attention of the executive group which made the decisions complained of by plaintiffs for the first time when their depositions in the case were taken (Hughes, R.Tr. 3784).
Form entitled "Personnel Specification Sheet" contained a blank at end for "desirable age."	Used in executive search for one employee to replace *both* Cancellier and another V.P., the "desirable age" blank was filled in with the word "open" and policy was always to leave it blank or enter "open"; no "desirable age" standard existed (Tonner, R.Tr. 2419-21).

Plaintiffs' Evidence	Magnin's Evidence
1977 organizational chart labeled "highly confidential" listing key executives, their ages and possible replacements.	Chart was confidential because, unlike charts distributed widely, this one set out top executive salaries (Hughes R.Tr. 75-76), ages were entered to identify employees nearing mandatory retirement (*ibid.*), and to identify people who might replace the individual at retirement (*id.* at 67).
Lydia Dresnek was told in 1973 by her supervisor, Mosson, of a plan to get rid of "old biddies."	Mosson denied any such statement flatly and under oath (R.Tr. 2624).
Costello testified his immediate supervisor referred to buyer in early 50's as "menopausal" and who bought handbags "which looked as old as she did" in support of Costello's claim of termination of age.	As DMM for accessories, Costello was "not doing the job in terms of market relationships, in terms of merchandising effort ability, in terms of his ability to interact with people and make things happen" (Fox, R.Tr. 3483); "Mr. Costello was not functioning effectively with the market" or with the buyers (R.Tr. 3485) and suppliers complained of Costello's "erratic kinds of behavior, yelling and screaming, pushing the panic button" (R.Tr. 3793); another DMM was terminated at the same time as Costello at age 38 (Fox, R.Tr. 3528, Def.Ex. J.C.11); and an offer was made to a candidate to replace Costello at an annual salary of $57,000 who was then age 48 (Fox, R.Tr. 3500, Def.Ex. J.C.12).

So much for any notion that the record contained no conflict on the best points respondents could marshal. A more detailed summary of the respects in which the facts were fiercely disputed is in the excerpts from the briefs below, with detailed record citations, in Appendix E to the Petition.

On this respondents say with revealing clarity (Br. Opp. 13) that "the Court of Appeals *found* • • • that the outcome of the trial would not be different even if the jury had been instructed in the manner" emphatically required by the opinion of the Ninth Circuit for all future cases—but not this one.[5]

FURTHER GROUNDS FOR THE WRIT: RESPONDENTS' DENIGRATION OF "SEMANTIC DIFFERENCES" IN FEDERAL LIABILITY STANDARDS IN AGE CASES AND THE RISK OF CONFUSION BETWEEN FEDERAL AND STATE CLAIMS

The description of difficulties already apparent among the circuits in jury instructions on ADEA liability as "semantic" is our own, of course (Pet., p. 23). Respondents

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5. Counsel rightly relegate to a footnote (Br. Opp. 17, n.4) the hint in the opinion of the court below, as it was amended on denial of rehearing, that the erroneous jury instruction here "was merely an unelaborated version of the correct standard" (Pet., App. B, p. B-2). The sharp criticism of the erroneous instruction retained in the amended opinion of the Ninth Circuit, however, leaves no doubt that in a future case a judgment founded on the verdict of a jury so unguided on the governing ADEA standard as the jury here will be reversed by the Ninth Circuit. For *other* errors and substantive departures in federal age cases, that language, if not disregarded in light of the Ninth Circuit's pointed discussion of the complexities encountered in seeking for discrimination based on age, poses a further risk that future substantive error will be brushed aside because a standard was "correct but unelaborated," yet in a manner which, in the words of the court below, "completely failed to give any guidance as to the meaning of" governing law.

say that since we are unable to point to a diametrical conflict among the circuits on ADEA liability within Rule 17, the existing situation amounts to no more than language quibbles undeserving of attention at this time. They also assert that we err in "hypothesizing" confusion between ADEA and state claims in age cases. But this ignores three basic facts: (1) the differences between approved ADEA liability standards in decisions throughout the United States go to the *substance* of rights guaranteed by a *single* federal statute to a predominant group of citizens in a field of federal litigation certain to involve a flood of cases soon, and it is unthinkable to risk anything but a uniform standard of jury decision of like cases throughout the United States, (2) the Court here has an opportunity to avoid the confusion and uncertainty attending early Title VII cases in which delay of authoritative pronouncement convinced litigants, some think, that employers were being held liable upon standards *which did not exist* at the time of the acts complained of, and (3) in the vast majority of age discrimination jury cases state claims will be welded to and tried with the federal ADEA claim on which jurisdiction depends—and jury confusion of variant standards of liability for state claims with a shifting, amorphous, even *ad hoc* articulation of the federal standard inevitably will result in reversal of judgments which might otherwise be affirmed, *and in this case the Court of Appeals explicitly warned that this would be so.*

Experience suggests it would be unwise in this sensitive area for the Court to withhold the power to clarify it alone possesses until a diametrical conflict among the circuits on ADEA liability which is almost certain to develop becomes fact. Lawyers undertaking to representing the interests of complainant employees between ages 40 and 70 have no

alternative but to bring cases in which federal jurisdiction is founded on ADEA but joined with state law claims for the same grievance and which turn on liability principles different from the federal standard. On this the Ninth Circuit in this case said (Pet., App. A, p. A-8, A-9, A-6) that "ADEA does not preempt the award of tort damages on pendent state claims," even though "in appropriate circumstances dismissal of the state claims without prejudice is proper," and yet warned (Pet., App. A, p. A-7):[6]

> "When state claims * * * are joined to claims of age discrimination under the ADEA, however, review of jury verdicts *presents special difficulties to appellate courts.* A general verdict may conceal punitive damages which may not be allowed under the ADEA. *If the state claims are flawed, the entire verdict may have to be reversed.*"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert S. Daggett
Attorney for Petitioner

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6. Albeit with specific reference to the need for a separate verdict for each claim and a separate verdict on punitive damages in cases like this, but in language of broader and deeper import for cases combining state and ADEA employee claims than the procedure on verdict forms specifically addressed, as we now show in the text following. The significance is that the "special difficulty to appellate courts" we discuss here is a warning cast not by counsel but by the *Ninth Circuit itself in this case.*